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88-127
Docket No.

In the Supreme Court of the United States

October Term, 1987

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

V.

ROBERT T. GOODE, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether a pier machinist who repairs and maintains coal loading machinery at a maritime terminal fulfills the status requirement of the Longshore and Harbor Workers' Compensation Act?

II. Whether a state court's adherence to a narrow definition of LHWCA status, despite uniform federal precedent to the contrary, effectuates the intent of Congress to create a simple uniform standard of coverage?

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ROBERT T. GOODE, JR.,

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Petitioner, Norfolk and Western Railway Company,[1/] respectfully prays that a writ of certiorari be issued to

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1/ Pursuant to Rule 28.1, Petitioner states as follows: Norfolk and Western Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation. Norfolk and Western Railway Company has the following subsidiaries (except wholly owned subsidiaries) and affiliates:

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review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The April 22, 1988 decree of the Supreme Court of Virginia, unreported, is reprinted in the appendix at 17A-18A.

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Wabash Railroad Company, The Wheeling and Lake Erie Railway Company, The Akron & Barberton Belt Railroad Company, The Belt Railway Company of Chicago, Chicago and Western Indiana Railroad Company, The Cleveland Union Terminals Company, Des Moines Union Railway Company, Ft. Wayne Union Railway Company, Green Real Estate Company, High Point, Thomasville & Denton Railroad Company, Iowa Transfer Railway Company, Kansas City Terminal Railway Company, Lafayette Union Railway Company, Peoria and Pekin Union Railway Company, Railbox Company, Railgon Company, Terminal Railroad Association of St. Louis, Trailer Train Company, Union Belt of Detroit, Winston-Salem Southbound Railway Company, Lamberts Point Barge Company, Inc., Norfolk and Portsmouth Belt Line Railroad Company, Norfolk Southern Marine Services, Inc., North American Van Lines, Inc., NS Fiber Optics, Inc., NS Transportation Brokerage Corporation, NW Equipment Corporation, Southern Railway Company, and Triple Crown Services, Inc.

The Court issued no separate opinion, relying instead on its March, 1988 opinion in the consolidated appeals of Schwalb v. Chesapeake & Ohio Railway and McGlone v. Chesapeake & Ohio Railway, 235 Va. 27, ____ S.E.2d ____ (1988),[2/] in the appendix at 19A-36A. The letter opinion of the late Judge Waters, Circuit Court of the City of Norfolk, is reprinted at 1A-14A. The trial court judgment appears at 15A-16A.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case specifically requires interpretation of the Longshore and

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2/ A petition for a writ of certiorari in these cases was filed in this Court on June 2, 1988 and has been docketed as No. 87-1979.

Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 902(3) and 905(a). The text of these subsections appears at 71A-73A and 75A respectively. This case also involves the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, the relevant portion of which is reprinted at 77A.

STATEMENT OF THE CASE

Hampton Roads, Virginia is the largest natural harbor in the world. The harbor, which encompasses the port cities of Norfolk, Hampton and Newport News, is located where the Chesapeake Bay meets the Atlantic Ocean and is fed by the historic James, Nansemond and Elizabeth Rivers. Since 1607, when English colonists landed at Cape Henry and proceeded up the James River to settle at Jamestown, Hampton Roads has been

a hub of maritime commerce. Today vessels destined for or arriving from all major foreign and domestic ports are loaded and unloaded at numerous maritime terminals in Hampton Roads, where all types of cargo are transshipped by rail and trucking common carriers. The highway and railway systems serving the Hampton Roads terminals include tunnels and bridges which span the Chesapeake Bay, Hampton Roads harbor, the Elizabeth River and soon the James River. Hampton Roads alone accounts for more export tonnage than all of the other principal Atlantic Coast ports combined. In 1985, 49,340,000 short tons of cargo were loaded at Hampton Roads, as compared with 29,824,000 tons handled collectively by the ports of New York, Baltimore, Philadelphia, Charleston and

Boston.[3/] Of this total, coal represents almost 90% of the export tonnage loaded onto outbound ships at Hampton Roads piers.[4/]

In addition, the Hampton Roads area teems with commercial shipbuilding and ship repair facilities, as well as the world's greatest concentration of permanent naval installations. Norfolk Naval Shipyard, built in 1767 and home of the oldest drydock in the Western Hemisphere, has built some of the most famous ships in our naval history, including the first aircraft carrier. There are also numerous private shipbuilding and repair facilities located

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3/ Source: Virginia Statistical Abstract, Table 21.3 (University of Virginia Center for Public Service, 1987 Ed.).

4/ Id., Table 21.19.

throughout the area. In short, Hampton Roads is perfused with an abundance of commercial maritime activities.

On the Elizabeth River in Norfolk, Virginia the petitioner, Norfolk and Western Railway Company, operates a coal loading terminal ("Lambert's Point"). Petitioner employs pier machinists, like respondent Goode, to repair and maintain machines and equipment at Lambert's Point that transfer coal from railroad cars to the holds of docked ships. This case involves the demarcation of "maritime employment" under the LHWCA to the exclusion of the FELA in the context of coal loading at Lambert's Point.

FACTUAL SUMMARY

Coal arrives at Lambert's Point from inland mines in railroad hopper cars, which are arranged by class in an

area called the "Barney Yard." Loading begins when the coal car is released from the Barney Yard to roll across the automatic scales toward the pier. A machine called a "Barney Mule" then propels the car toward the dumper, which is located at the land end of the pier. Positioned by a retarder[5/] and embraced by the dumper's mechanical arms, the coal car is tipped upside down, allowing the cargo to fall onto conveyor belts leading to the loading tower, where the coal drops into the hold of the ship. Barring mechanical problems, the coal moves continuously from the automatic scales into the ship within a matter of

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5/ The retarder is a mechanical device that stops the loaded coal car at the correct position on the dumper to permit the car to be held in place while being rotated 180°.

minutes by means of machines and gravity. Within 30 minutes after loading is completed, the vessel is expected to be away from the pier and on its journey.

Beginning in 1979, respondent was assigned to petitioner's Lambert's Point Motive Power-Piers department. His first duties included line tending, tying up ships at the pier, but by the time of his accident in 1985, respondent had been promoted to pier machinist. According to respondent's supervisors, pier machinists devote 98 to 99 percent of their work time repairing and maintaining the equipment directly involved in loading coal: the dumper, the shiploaders out on the pier, and the conveyor belt system between the two. On the day of his accident, respondent Goode was performing routine repairs on

the retarders attached to the Pier 6 dumper. The loading process was necessarily brought to a halt during the several hours respondent was repairing the retarder linkage. Respondent injured his hand as he was reattaching the air cylinder to the linkage on the dumper.

RAISING THE FEDERAL QUESTION

Goode brought an action in the Circuit Court for the City of Norfolk, seeking damages under the FELA. Petitioner moved to dismiss the FELA action for lack of jurisdiction, contending that the LHWCA provided plaintiff's sole and exclusive remedy. After an evidentiary hearing, the trial court sustained the railway company's motion and dismissed the FELA action. Acknowledging that the duty of lower state courts "is not to make law but to interpret and

follow the law as set forth by courts of higher dignity," the late Judge Waters found that respondent Goode was a maritime employee "involved in the essential elements of loading and unloading" as that phrase has been employed in numerous federal decisions applying the LHWCA status test. Judge Waters acknowledged the conflict between the Fourth Circuit Court of Appeals decision, Price v. Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980), and the earlier Virginia Supreme Court decision, White v. Norfolk & Western Railway, 217 Va. 832, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Expressing the belief that Goode would be found a maritime employee even under the narrower White analysis, Judge Waters nevertheless held that "this case does involve a federal

question, the federal authorities are therefore the more persuasive, and to the extent that White differs from significant federal decisions, the White court, in my opinion must yield." See Judge Waters' opinion at 10A.[6/]

The sole issue considered by the Supreme Court of Virginia on appeal was whether Goode was a statutory employee as defined by the LHWCA. Persisting in its adherence to the narrow standard

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6/ Newport News Circuit Court Judge Stephens, in Schwalb v. Chesapeake & Ohio Ry., No. 8827 (Aug. 8, 1984) and Portsmouth Circuit Court Chief Judge Schlitz, in McGlone v. Chesapeake & Ohio Ry., No. L84-327 (May 29, 1985) also chose to follow Price and the uniform federal authorities extending LHWCA coverage to pier employees, with Judge Schlitz noting that "White stands alone in contrast to the federal decisions . . . which have declined to follow White and have disagreed with its results." See Opinion of Judge Stephens, 61A-62A, and Opinion of Chief Judge Schlitz, 46A-47A. These rulings were also reversed by the Virginia Supreme Court on appeal. See infra note 2 and accompanying text.

established in its pre-Caputo White decision, the Supreme Court of Virginia reversed and annulled the judgment of the Norfolk Circuit Court and remanded the case for trial on the merits as an FELA claim. The court issued no explanatory opinion to support its decree, merely referring instead to its opinion issued the previous month in Schwalb v. Chesapeake & Ohio Railway, and McGlone v. Chesapeake & Ohio Railway, cited supra p. 3 and discussed in detail infra pp. 35-37.

ARGUMENT

Congress enacted the LHWCA in 1927 to provide federal compensation for injured employees working on navigable waters who were otherwise ineligible for state compensation awards. The disparities in coverage perpetuated by

the 1927 scheme along with the advent of containerized cargo loading technology prompted Congress to amend the Act in 1972. See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 259-63 (1977). The 1972 Amendments broadened the scope of LHWCA coverage: by expanding the definition of the covered situs in 33 U.S.C. § 902(4), to include piers, terminals, and other areas customarily used for cargo loading; and by affirmatively describing the class of covered maritime employees, defined in 33 U.S.C. § 902(3), to include, for example, harbor workers and other persons "engaged in longshoring operations."[7/]

7/ Further amendment in 1984 refined the

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This Court has prescribed judicial standards, consistent with the legislative intent of the 1972 amendments, for determining whether a terminal worker is engaged in maritime employment (the so-called "status" test) for purposes of the LHWCA. For more than a decade, the lower federal courts and the Benefits Review Board, the admininstrative body that oversees LHWCA claims, have contributed additional insightful analyses while applying the status test in a

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"maritime employee" definition in response to some administrative and judicial uncertainty about the intended scope of the act. Congress, however, left undisturbed the 1972 coverage language applicable to this case. See infra p. 28 (discussing inference that legislative re-enactment implicitly adopts prior judicial and administrative interpretations). The 1984 version of § 902(3) appears at 71A; the prior version appears at 74A.

variety of factual settings. It is too late in the evolution of the LHWCA status test for the Supreme Court of Virginia to have misapprehended the principles approved by this Court. By denying LHWCA status to respondent Goode, a harbor worker engaged in an integral and essential part of the coal loading sequence, the Virginia Supreme Court has obviously repudiated controlling federal precedent. Such unsanctioned autonomy imperils the advancement of the single, uniform standard of coverage envisioned by Congress and warrants intervention by this Court.

I. Goode is a maritime employee

Determination of a worker's status as a maritime employee within the terms of the LHWCA is controlled by principles established in Northeast Marine Terminal

Co. v. Caputo, 432 U.S. 249 (1977). In Caputo, the Court found that Blundo, who monitored the stripping of cargo from unloaded containers, was engaged in maritime employment because his job was "an integral part of the unloading process." Id. at 271. By finding coverage for Blundo, who was performing essentially clerical duties at a shoreside loading facility, the Court emphasized that the critical question in determining LHWCA status is the purpose of the work, not the type of work. The Caputo Court also acknowledged that the expansiveness of the 1972 Amendments requires a corresponding expansive reading of the Act by the judiciary. Id. at 268. The Court reaffirmed this approach to the LHWCA status test in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979). Again

focusing on the nature of a worker's general job responsibility and its relation to the shiploading process, the Pfeiffer Court ruled that two pier workers were maritime employees because they were "engaged in intermediate steps of moving cargo between ship and land transportation." Id. at 83.[8/] The Pfeiffer Court stressed that extending LHWCA coverage to workers involved in any portion of the cargo moving process would best effectuate the congressional goal of "a simple, uniform standard of coverage." Id. These two cases are credited with having created a

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8/ More recently, in Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983), the Court has emphasized that the Act is to be "liberally construed" and has reaffirmed that Congress intended the amended Act to "extend" coverage and protect "additional" workers. 459 U.S. at 315-16 (quoting legislative history).

"functional relationship" test for LHWCA status: if a job is functionally related to the movement of maritime cargo, it is maritime employment for the purpose of LHWCA coverage.

Following these authorities, the Court of Appeals for the Fourth Circuit found a railroad employee whose responsibilities included maintaining and repairing equipment and structures used in loading and unloading vessels to be engaged in maritime employment within the terms of the LHWCA.[9/] In Price v.

9/ Although railroad workers generally are required to seek damages for work-related injuries under the FELA, it is well settled that railroad company employees must be compensated under the LHWCA if they are injured while engaged in maritime employment. See Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953); Nogueira v. New York, N.H & H.R.R., 281 U.S. 128 (1930). Congress has never amended either Act

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Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980), the court found that the employee, who was injured while painting a tower supporting the conveyor belt system used to transport grain to the holds of nearby vessels, was required to seek his remedy under the LHWCA. To reach the conclusion that this worker was a maritime employee, the panel reasoned that:

(1) the equipment being maintained by the claimant was essential to the loading and unloading of vessels at the port; and

(2) the maintenance and repair of longshoring machinery and equipment is as essential to the movement of maritime cargo as the actual loading and unloading of ships.

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to permit choice of coverage, or to exempt railroad employees from the LHWCA, despite over 50 years of case law construing the LHWCA to provide exclusive coverage.

Id. at 1061. The Price court expressly disagreed with White v. Norfolk & Western Railway, id. at 1062, finding the reasoning in a Benefits Review Board decision to be more persuasive:

> Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment.

Bradshaw v. McCarthy, 3 Ben. Rev. Bd. Serv. (MB) 195, 198 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977), quoted in Price v. Norfolk & Western Railway, 618 F.2d at 1061 (emphasis added).

In Harmon v. Baltimore & Ohio Railroad, 741 F.2d 1398 (D.C. Cir. 1984), the Court of Appeals for the D. C. Circuit reached the same conclusion with regard to a railroad carpenter who was injured while repairing a hopper through which coal passes during the loading process. Adopting the Pfeiffer standard of coverage for employees "engaged in intermediate steps of moving cargo," the Harmon court reasoned that, since coal-loading equipment is essential to the movement of maritime cargo from railcars to ships, "the repair and maintenance of that equipment must also be considered as an integral part in the loading and unloading of ships." 741 F.2d at 1403-04.

Other circuits have similarly applied the functional relationship test

derived from Caputo and Pfeiffer, in deciding that workers who maintain or repair equipment essential to loading vessels are maritime employees for LHWCA purposes.[10/] Illustrative cases include Sea-Land Services, Inc. v. Director, OWCP, 685 F.2d 1121, 1123 (9th Cir. 1982) (repair and maintenance of equipment necessary to loading ships integral

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10/ Although this Court has never specifically addressed the issue, it has suggested in dicta that mechanics who maintain loading equipment are engaged in maritime employment. In Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985), the Court refused to extend LHWCA coverage to a welder working on a fixed off-shore drilling platform. In language important to this case, the Court pointedly remarked that the employee's "work had nothing to do with the loading or unloading process, nor [was] there any indication he was even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425 (emphasis supplied). Furthermore, this Court has held that the specific jobs named in § 902(3) comprise only "a part of the larger group of activities that make up 'maritime employment'. . . ." P.C. Pfeiffer Co. v. Ford, 444 U.S. at 77 n.7.

to process, thus "maritime employment" for LHWCA); Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750, 755 (5th Cir. 1981) (maintenance and repair of longshoring equipment and facilities, essential and indispensable step in shiploading process, constitutes "maritime employment" for LHWCA), cert. denied, 454 U.S. 1163 (1982); Garvey Grain Co. v. Director, OWCP, 639 F.2d 366, 370 (7th Cir. 1981) (repair and general maintenance of conveyors and other loading equipment integral part of loading process, conferring LHWCA status on worker performing these tasks); Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 37 (1st Cir. 1980) (repair and maintenance of integrated shiploading equipment qualifies

as maritime employment for LHWCA), cert. denied, 452 U.S. 938 (1981).

Administrative decisions affording LHWCA coverage to maintenance mechanics have proliferated following the 1972 legislation. In some of these decisions coverage is premised on the same rationale as Caputo, Price and Harmon: since the repair and maintenance of loading equipment is integral and essential to the movement of maritime cargo, employees who perform such work have the status of LHWCA employees. See, e.g., Wuellet v. Scappoose Sand and Gravel Co., 15 Ben. Rev. Bd. Serv. (MB) 223(ALJ) (Dec. 29, 1982) (LHWCA coverage for mechanic injured while changing conveyor belt); Jackson v. Atlantic Container Corp., 15 Ben. Rev. Bd. Serv. (MB) 473 (Aug. 24, 1983) (LHWCA coverage

for terminal mechanic who performed minor repairs and monthly maintenance on link span); Ganish v. Sea-Land Services, Inc., 13 Ben. Rev. Bd. Serv. (MB) 419 (April 28, 1981) (LHWCA coverage for terminal mechanic who regularly maintained and repaired equipment used to move cargo containers and loading personnel), aff'd sub nom. Sea-Land Services, Inc. v. Director, OWCP, 685 F.2d 1121 (9th Cir. 1982); Lewis v. Pittson Stevedoring Corp., 7 Ben. Rev. Bd. Serv. (MB) 691 (Feb. 10, 1978) (LHWCA coverage for terminal garage mechanic who regularly repaired and maintained cargo handling tools and equipment). Alternatively, the Benefits Review Board has construed "harbor workers" to encompass mechanics who repair the cargo loading equipment installed at a maritime

terminal. See Stewart v. Brown & Root, Inc., 7 Ben. Rev. Bd. Serv. (MB) 356, 365 (Jan. 12, 1978) ("harbor workers" defined to include "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)" for purposes of the LHWCA status test).

These administrative decisions are not cited as meriting special deference by federal courts, cf. Kelaita v. Director, OWCP, 799 F.2d 1308, 1310 (9th Cir. 1986); rather they exemplify the consistent pattern of judicial and administrative decisions, of which Congress would have been aware in 1984, in which terminal mechanics who repair loading

equipment are deemed § 902(3) maritime employees. Against this background, it is highly significant that the 98th Congress did not exclude maintenance mechanics (or railroad employees) when it otherwise restricted the scope of § 902(3) in the 1984 amendments.[11/] See Lorillard v. Pons, 434 U.S. 575, 580 (1978) (Congress presumed aware of particular interpretations of legislative provisions when it reenacts statutory language without change). The conclusion that Congress implicitly adopted these prior judicial and administrative interpretations is more compelling when the "status" restrictions that were

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11/ In fact, a 1980 proposal to expressly exclude, inter alia, workers engaged in "maintenance, or repair of gear or equipment" died in Committee. See Herb's Welding v. Gray, 470 U.S. 414, 423 n.9 (1985).

added by the 1984 amendments are considered. After LHWCA benefits had been awarded in the early 1980's to security workers, museum employees, restaurant employees, and workers repairing recreational vessels under sixty-five feet in length, it is hardly fortuitous that Congress excluded such workers from coverage in §§ 902(3)(A), (B), and (F). Cf., e.g., McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) (according LHWCA status to worker painting museum vessel), cert. denied sub nom. South Street Seaport Museum v. McCarthy, 465 U.S. 1078 (1984); Arbeeny v. McRoberts Protective Agency, 642 F.2d 672 (2d Cir.) (according LHWCA status to pier security guards), cert. denied, 454 U.S. 836 (1981); Mississippi Coast Marine, Inc. v. Bosarge, 637 F.2d 994 (5th Cir.)

(according LHWCA status to marine carpenter who repaired recreational vessels up to sixty feet in length), modified on other grounds, 657 F.2d 665 (1981); Cefaratti v. Mike Fink, Inc., 83 LHWCA-1992 (according LHWCA status to restaurant worker), aff'd, 17 Ben. Rev. Bd. Serv. (MB) 95 (Feb. 27, 1985). The legislative history explaining the purpose of the 1984 amendments to § 902(3) expressly states:

> [I]t is the intention of the Committee neither to expand nor to contract the current coverage of the Longshore Act. The Committee concurs with the view of the Senate Committee on Labor and Human Resources in this regard, which stated ". . . with the committee making only limited changes to [these sections] of the act, it is obvious that a large body of decisional law relative to traditional maritime employers [sic] and harbor workers remains undisturbed."

H.R. Rep. No. 570, Part I, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. Code Cong. and Ad. News 2734, 2738 (1984) (emphasis added). To paraphrase Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980): where Congress explicitly enumerates certain exceptions to coverage, additional exceptions are not to be implied.

In 1977, without the guidance of Caputo and Pfeiffer, the Supreme Court of Virginia held that a railroad mechanic who maintained and repaired loading equipment at the Norfolk coal piers was not a LHWCA employee because he was "not directly involved in the loading of coal." White v. Norfolk & Western Railway, 217 Va. at 832, 322 S.E.2d at 833 (emphasis in original). Focusing on the fact that plaintiff was

"not actually handling any cargo, either manually or mechanically," 217 Va. at 833, and borrowing language from Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir.) ("realistically significant relationship to 'traditional maritime activity'"), cert. denied, 429 U.S. 868 (1976)[12/] and Jacksonville

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12/ The Weyerhaeuser opinion is inapposite authority for analyzing the status of workers at a commercial loading pier: the Weyerhaeuser plaintiff was a pondman injured while working on a sawmill log pond, not a repairman maintaining shiploading equipment beside a deep water pier. See 528 F.2d at 961 (pondman's work not maritime employment in traditional sense; no "realistically significant relationship" to traditional maritime activity involving navigation and commerce on navigable waters). As pointed out in Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1049 (5th Cir. 1982), Weyerhaeuser formulated its "significant relationship" status test from language in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), which addressed the separate question of federal admiralty jurisdiction in claims arising from aviation accidents. The Weyerhauser holding does

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Shipyards, Inc. v. Perdue, 539 F.2d 533, 539 (5th Cir. 1976) ("directly involved"), vacated and remanded, 433 U.S. 904 (1977), the White court found that the plaintiff was outside the scope of the Act because he was "only maintaining the electrical devices on the share and attached to the pier, work which is not the traditional work of a ship's service employee." Id. (emphasis in original). In the decade following White, not one reported court opinion has acknowledged White as persuasive authority. Both the Ninth and Fifth Circuits, relied on by the White court, have subsequently held that workers who

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not speak persuasively as to the intended reach of federal jurisdiction in the context of maritime employment compensation.

repair and maintain shiploading equipment are within the scope of the LHWCA. See, e.g., Sea-Land Services, Inc. and Hullinghorst Industries, Inc., both supra.

Given the tenuous underpinnings of White and the subsequent clarification of the LHWCA status test in the federal fora, the lower courts in Virginia had inferred that they were no longer bound under stare decisis to follow White. See, e.g., Opinion of Judge Stephens in Turnista v. Chesapeake & Ohio Railway, No. 8690-WS (Newport News Circuit Court May 21, 1984), 49A, 61A-62A (respectfully declining to follow White and concluding Price is controlling); Opinion of Judge Waters in Goode, 10A (federal authorities controlling on issue of application of federal statute); Opinion

of Judge Smith in Schwalb, 39A (relying on interpretations of LHWCA expressed by U.S. Supreme Court); and Opinion of Judge Schlitz in McGlone, 47A (conflict between state and federal authority must be resolved in favor of latter). Doubtless Virginia's trial judges were as surprised as the railroads' counsel when the Supreme Court of Virginia used its review of the Schwalb and McGlone appeals not to reject, but to reaffirm the vitality of its White rationale. In its March 4, 1988 opinion, the Schwalb-McGlone court opined that Congress did not intend the 1972 amendments to "have such pervasive and preclusive effects" as had been attributed to them by, for example, the Fourth Circuit Court of Appeals in Price. 235 Va. at 32. Rejecting again the functional

relationship formula that has, since White, been the linchpin of the LHWCA status test, id. at 31, the Supreme Court of Virginia regressed to an illogical demarcation of coverage where "workers who perform purely clerical tasks" are indistinguishable from workers who perform repairs and maintenance "such as painting" (a clear reference to Price), id. at 33, both groups failing to fulfill the Virginia Supreme Court's rigid requirements for LHWCA coverage. The court recast its LHWCA status test in terms of an "essential elements" standard, which it described as "more nearly akin to the 'significant relationship' standard . . . adopted in White than the 'overall process' construction invoked by the defendant." Id. Thus clothed in semantics, the

court ruled that Schwalb and McGlone were non-covered workers, "perform[ing] purely housekeeping and janitorial tasks." Id.[13/]

Under any of the federal or administrative authorities construing § 902(3) since the 1972 amendments, respondent Goode would clearly be a maritime employee, either as a harbor worker or as a person engaged in

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13/ Both Schwalb and McGlone were pierside mechanical workers at a coal loading maritime terminal similar to Lambert's Point. Their primary job responsibility was to ensure the continuous functioning of coal loading equipment by retrieving accumulations of coal from around and beneath the loading equipment and conveyor belts. Schwalb was injured on her way to perform a thorough cleaning of the trunnion rollers that rotate the dumper; McGlone was injured while blowing trapped coal from beneath the moving conveyor belt with an air hose. Even the Virginia Supreme Court acknowledged that failure to remove these coal accumulations would eventually cause malfunctions and interruptions in the coal loading process. 235 Va. at 29.

longshoring operations. The Virginia Supreme Court's memorandum decision in Goode, issued the month after the Schwalb-McGlone decree, evinces the state court's unyielding refusal to analyze the functional relationship of specific pierside jobs to the loading process, and signals the court's apparent intention to exclude all but those labeled longshoremen and shipbuilders from LHWCA benefits.[14/] The Virginia Supreme Court is now entrenched in its

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14/ The Virginia Supreme Court's rationale would also bar from LHWCA coverage workers who maintain or repair shipbuilding or shiprepair equipment. This position conflicts directly with the Fourth Circuit's holding in Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), and ignores this Court's repeated observation that the maritime occupations specifically listed in § 902(3) were not intended to be exclusive. See Herb's Welding, 470 U.S. at 421 n.9; P. C. Pfeiffer, 444 U.S. at 77-78 n.7.

defiant disavowal of controlling federal precedent, requiring redress through the mechanism of this Court's review.

II. The Virginia Supreme Court decision offends the congressional goal of a uniform standard

Disdaining the federal courts' uniform interpretation of the LHWCA status test, the Virginia Supreme Court has flouted the congressional mandate to apply a "simple, uniform standard of coverage," and has ignored the instructon of Caputo, P.C. Pfeiffer, and their progeny. Maintaining uniformity in the application of the LHWCA is at least as important today as it was when the Court granted certiorari in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962).

Decisions of the United States Supreme Court are final and

authoritative with respect to the construction and application of federal statutes. Monessen Southwestern Railway v. Morgan, 56 U.S.L.W. 4494 (U.S. June 6, 1988). Absent clear words to the contrary, construction of the language in a federal statute is a federal question. Western Air Lines v. Board of Equalization, 480 U.S. ____, 94 L.Ed.2d 112, 119 (1987). A state court is not free to follow its own dictates or precedent in areas of federal substantive law in the face of federal authority to the contrary. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942). As this Court admonished in an earlier demonstration of independence by the Supreme Court of Virginia:

> [T]he vice of this position is that, in following its own prior decision, the court ignored the decision of this

> court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209, 220-221 (1931).

The mischief created by this aberrant state court decision will not be limited to the parties in this action. The judges in Virginia's trial courts, as well as administrative law judges hearing Virginia cases, must now immediately confront the dilemma of divergent authority within the state on the threshhold question of jurisdiction. Employers in Virginia now face uncertainty as to their responsibility to

secure compensation under the LHWCA.[15/] An indirect consequence of the Virginia Supreme Court decision will be "forum shopping" by, for example, pierside railroad workers in other states who seek to avoid the exclusive jurisdiction of the LHWCA. Due to the vagaries of Virginia's venue statue, a resident of any state can bring an action in Virginia against an employer that does business in the state of Virginia; the action is not vulnerable to dismissal or transfer even if the plaintiff and all witnesses reside in another state and

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15/ The practical problems engendered by this uncertainty are comprehensively described in the Brief of Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in support of the Petition for Writ of Certiorari in Schwalb-McGlone, at 8-11. The relevant portions of this brief are reprinted in the appendix at 65A-70A.

the accident occurred outside Virginia. Va. Code § 8.01-265 (1950 as amended).[16/] If the Goode decision stands uncorrected, there is little doubt that Virginia courts will soon be inundated by foreign FELA actions, brought by maritime plaintiffs escaping the federal and state courts elsewhere that adhere to the federal standard. This is hardly the result Congress intended when it amended the LHWCA to establish a simple, uniform standard of coverage.

To allow the Virginia Supreme Court decision to stand would frustrate the spirit and purpose of the LHWCA, create

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16/ The Supreme Court of Virginia has recently agreed to hear argument on the constitutionality of this statute. Seaboard Systems Railroad, Inc. v. Caldwell, Record No. 870490 (Va. Sup. Ct.) (presently pending argument).

a favored class of maritime employees, perpetuate a dichotomous approach to the LHWCA status test, and burden the courts with unnecessary litigation.

CONCLUSION

For the above reasons, petitioner Norfolk and Western Railway Company respectfully submits that this petition should be granted and that the judgment by the Supreme Court of Virginia should be reversed.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY COMPANY

By Edward L. Oast, Jr.

Edward L. Oast, Jr.
John Y. Richardson, Jr.
Joan F. Martin
Williams, Worrell, Kelly & Greer, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari upon the Respondent, Robert T. Goode, Jr., at the office of his counsel of record, Bruce A. Wilcox, P.O. Box 3747, Norfolk, Virginia 23514, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Respondent as set forth above, on or before July 21, 1988.

I further certify that I am a member of this Court, and that all parties required to be served have been served on or before July 21, 1988.

Edward L. Oast, Jr.

Edward L. Oast, Jr.
Of Counsel for Petitoner

APPENDIX

FOURTH JUDICIAL CIRCUIT OF VIRGINIA

CIRCUIT COURT OF THE CITY OF NORFOLK

November 13, 1986

Eddie W. Wilson, Esquire
2200 Colonial Avenue, Suite 12-B
P. O. Box 11168
Norfolk, Virginia 23517

John Y. Richardson, Jr., Esquire
Williams, Worrell, Kelly & Greer
600 United Virginia Bank Building
P. O. Box 3416
Norfolk, Virginia 23514-3416

Re: Robert T. Goode, Jr. vs.
Norfolk and Western Railway Co.
At Law No. L-86-335

Gentlemen:

Thank you for the help that you have given the court. I have studied all of the material supplied, including the opinions cited in your excellent briefs.

If this case were one of first impression, I would be tempted to rule that Congress, by enacting the

Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), did not intend to strip a railroader of any of his benefits under the Federal Employer's Liablility Act (F.E.L.A.) under any circumstances so long as he was working for the railroad at the time of injury, a narrow, unintellectual approach which makes good sense.

The duty of this court, however, is not to make law but to interpret and follow the law as set forth by courts of higher dignity. In following that duty, I feel that I am directed by the existing law to rule that, under the particular facts of this case, the motion for judgment must be dismissed for reason that exclusive jurisdiction lies within the ambit of the L.H.W.C.A.

Railroad cars filled with coal come cross country in both interstate and intrastate commerce and come to rest in what is called the barney yard located near pier 6 at the Lambert's Point terminal in Norfolk, Virginia. After the coal has come to rest in the barney yard, the process of loading the coal into vessels begins. The loaded cars are moved from the barney yard through a thawing shed, and are then pushed up a raised track by small locomotives called pushers onto the dumper located near the piers. As these loaded cars are pushed on to the dumper, their progress is slowed or stopped by equipment known as a retarder. The cars revolve, dumping the coal onto conveyor belts which deliver the dumped coal directly into the holds of waiting vessels docked at

the piers. The empty cars are pushed to the apex of the raised track and then, through the force of gravity, are returned to a holding yard from where they will again be dispatched to coal fields located in various parts of the country.

The plaintiff was a machinist who was injured while repairing the retarder on the dumper located near pier 6. The dumper and retarder on which the plaintiff was working are located 500 to 550 feet from the water. Retarders are located throughout the railroad system; however, the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked

vessels at pier 6. The entire loading operation at pier 6 must cease when the retarder is inoperative or is being repaired, and the loading operation had in fact ceased at the time of the injury to the plaintiff.

Machinists may be assigned to what is known as the Motive Power Department which has the function of maintaining and operating the coal dumping facility of the railroad. Machinists may be assigned to different locations such as the 38th Street car shop or the roundhouse, which may be miles away from the water, or they may be assigned to Lambert's Point. The location is determined by seniority, and a machinist working at the pier at Lambert's Point may be forced to work at another location because of the electing of a more

senior machinist to work at the pier. At the time of the accident, the plaintiff had been assigned for some time to work at Lambert's Point. While assigned to Lambert's Point, machinists spend the overwhelming portion of their working time maintaining and repairing machines and equipment essential to the coal dumping operation. Machinists do not, for example, regularly repair cars for that is the job of the trainmen. The great majority of the working time of a machinist while assigned to Lambert's Point is spent on the maintenance and repair of machinery which facilitates the dumping operation after the cars have left the barney yard. The machinists are required to pay into the railroad retirement plan and are subject to the Railway Labor Act.

Under the facts of this case, the railroad is an employer within the meaning of the L.H.W.C.A., Noqueira v. New York, N.H. & H.R. Co., 281 U.S. 128, 132, 44 L.Ed. 754, 50 S.Ct. 303 (1930), and the plaintiff is an employee within the meaning of the L.H.W.C.A., Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 62 L.Ed. 2d 255, 100 S.Ct. 328 (1979), and he cannot walk in and out of coverage because, I believe, that the overwhelming portion of his work is essential to the loading and unloading operation.

The Supreme Court in Herb's Welding v. Gray, ____ U.S. ___, 84 L.Ed. 2d 406 (1985), while holding that a welder working on a fixed offshore oil-drilling

platform was not engaged in maritime employment within the meaning of L.H.W.C.A., has stated:

> But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading. (Emphasis added).
>
> We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation. (Emphasis added).

On the facts of this case, I hold that the plaintiff was involved in the essential elements of loading and unloading and that he was actually involved in moving cargo between ship and land transportation. After all, the entire loading operation ceased during the repair of the retarder on which the plaintiff was working when injured. The

location of the retarder was on the dumper, and the sole purpose of this particular retarder was to stop coal-loaded cars so that the coal could be dumped onto the belts feeding the vessel. It must be remembered that plaintiff's supervisors testified that 99 percent of the work of a machinist assigned to Lambert's Point was the maintenance and repair of machines and equipment directly and solely related to the loading and unloading operation. Even the most biased witnesses could not seriously testify that less than 50 percent of the work was not so related, while the machinist was assigned to Lambert's Point.

The plaintiff places a great deal of emphasis on White v. N & W. Ry. Co., 217 Va. 832 (1977), decided in the same

year as Conti v. N. & W. Ry. Co., 566 F.2d 890 (4th Cir.).

It is my belief that, under the facts of this case, the plaintiff did have "a realistically significant relationship to the loading of cargo on ships" and that he was directly involved in the process of loading coal on the vessels within the meaning of the White test. Furthermore, this case does involve a federal question, the federal authorities are therefore the more persuasive, and to the extent that White differs from significant federal decisions, the White court, in my opinion must yield.

As counsel well know, there have been a number of significant decisions subsequent to White, one of the leading decisions being Price v. Norfolk &

Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980). In my opinion, the Price court did set forth the proper test in determining whether there is exclusive coverage under the L.H.W.C.A., that test being whether the plaintiff's job was an essential element in the loading and unloading of the vessels. I hold that in this case the plaintiff's job was an essential element, although in light of the later ruling in Herb's Welding, supra, I would not hold that the painter's job in the Price case was an essential element.

I believe that Newport News Shipbuilding & Dry Dock v. Graham, 573 F.2d 167 (4th Cir.), cert. den., 439 U.S. 979, 58 L.Ed. 2d 649, 99 S.Ct. 563 (1978), fortifies my opinion in this case, and I do not think that this

opinion is in substantial conflict with Conti v. N. & W. Ry. Co., 566 F.2d 890 (4th Cir. 1977), although I do agree with the D.C. Circuit Court that even before Herb's Welding, supra, the Fourth Circuit had moved away from a test of balancing traditional railroad tasks against traditional maritime tasks. Harmon v. Baltimore & Ohio R.R., 741 F.2d 1398 (D.C. Cir 1984).

I am cognizant of my colleague's decision in Evans v. N. & W. Ry. Co. (Norfolk Circuit Court 1985), but likewise do not feel that we are in conflict. After a close reading of his decision, I believe that, under the facts of this case, Judge Clarkson would have reluctantly reached the same decision which I have reluctantly reached.

With regard to the situs test, I hold that the most important factor is the nature of the work rather than the distance from the water and that the test has been met. Graham, supra; Prolerized New England Co. v. Miller, 691 F.2d 45 (1st Cir. 1982); Prolerized New England Co. v. Ben. Rev. Bd., 637 F.2d 30 (1st Cir. 1980), cert. den. 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed. 2d 952 (1981); Sea-Land Serv. v. Director, etc., 685 F.2d 1121 (9th Cir. 1982); Garvey Grain Co. v. Director, etc., 639 F.2d 366 (7th Cir. 1981).

I commend both counsel for their thorough preparation for the hearing and their excellent briefs.

Mr. Richardson may prepare the order for Mr. Wilson's endorsement.

Please have the order forwarded to me prior to November 19, 1986, if possible.

Very truly yours,

Charles R. Waters, II
Judge

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF NORFOLK

ROBERT T. GOODE, JR.

Plaintiff,

v. Docket No. L-86-335

NORFOLK & WESTERN RAILWAY CO.,

Defendant

ORDER

This day came the parties to this action, by counsel, pursuant to defendant's Motion to Dismiss on the basis that Congress has vested exclusive jurisdiction over this matter in the Longshoreman's and Harbor Workers Compensation Act, counsel having fully argued and briefed defendant's motion. The court has fully considered the evidence presented, the briefs and arguments of counsel and has filed its

letter opinion dated November 13, 1986 which is incorporated by reference.

For the reasons set forth in the opinion letter, it is accordingly ORDERED that the motion be granted, and it is accordingly ORDERED that this action be DISMISSED WITH PREJUDICE, the plaintiff's exceptions being so noted.

Enter this Order: 12/17/86

/s/ Charles R. Waters, II
Judge

I ask for this:

/s/ John Y. Richardson, Jr. p.d.

Seen and Exceptions Noted:

/s/ Eddie Wilson p.q.

/s/ Bruce A. Wilcox p.q.

April 22, 1988

SUPREME COURT OF VIRGINIA

Record No. 870252
Circuit Court No. L86-335/L2341-86

Robert T. Goode, Jr., Appellant,

against

Norfolk & Western Railway Company, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of December, 1986.

Upon consideration of the record and briefs, and on the basis of Schwalb v. C & O Railway Co., 235 Va. ____, ____ S.E.2d ____ (1988), the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A copy,

Teste:

David B. Beach, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

PRESENT: ALL THE JUSTICES

OPINION BY JUSTICE RICHARD H. POFF

March 4, 1988

Record No. 841743

NANCY J. SCHWALB

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS

Douglas M. Smith, Judge

Record No. 850728

WILLIAM MCGLONE

v.

THE CHESAPEAKE AND
OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH

Lester E. Schlitz, Judge

In this appeal, we review two judgments entered in separate actions, each sustaining a plea to the jurisdiction. Claiming damages for personal injuries, each plaintiff had invoked the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) (FELA). In each appeal, the sole issue is whether the plaintiff was a statutory employee as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982) (LHWCA or the Act). If so, the parties agree that the remedy provided by the Act is exclusive, see 33 U.S.C. § 905(a) (1982), and that we should affirm the judgments.

The two plaintiffs are Nancy J. Schwalb and William C. McGlone. Each was an employee of the defendant, The Chesapeake and Ohio Railway Company.

Although the accidents resulting in the plaintiffs' injuries occurred at different times, the facts in the two cases, insofar as relevant to the issue common to the two appeals, are substantially identical. Each plaintiff was employed as a laborer to perform housekeeping and janitorial services in the offices, shops, bathrooms, and other places situated on the defendant's pier and adjacent property in Newport News. This property is equipped with facilities designed to transfer coal from railroad cars to ships moored at the pier. A "dumper", activated by "trunnion rollers", upends railroad cars and dumps the coal into "hoppers". The coal falls from the hoppers onto conveyor belts that carry it to a "loading tower" from

which it is poured into the hold of a ship.

Coal spilled on the trunnion rollers can cause the dumpers to malfunction. Coal falling and accumulating beneath the conveyor belts eventually may damage the belts and interrupt the loading process. As part of the duties assigned by the defendant, the plaintiffs were required to clear away coal spilled in these areas. Because they were not members of a longshoremen's union, the plaintiffs were forbidden to load that coal onto the conveyor belts. The plaintiff McGlone was clearing away coal beneath a conveyor belt at the time he was injured. The plaintiff Schwalb was injured in a fall as she was walking along a "catwalk" approaching the trunnion rollers.

The parties in both cases agree that the defendant railroad is a statutory employer as defined in the LHWCA, that is, an employer "any of whose employees are employed in maritime employment, in whole or in part". 33 U.S.C. § 902(4) (1982). The plaintiffs' contention is that the trial courts erred in ruling that they were statutory employees as defined in the Act. The plaintiffs rely upon our decision in White v. N. and W. Ry. Co., 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Reviewing a judgment based on such a ruling, we applied the Act as amended in 1972, Pub. L. No. 92-576, 86 Stat. 1251, to the facts in White. First enacted in 1927, Pub. L. No. 69-803, 44 Stat. (part 2) 1424, the LHWCA was the first successful

congressional response to the Supreme Court's decision in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). There, the Court had ruled that a state worker's compensation act could not constitutionally apply to a longshoreman injured in an accident that had occurred on a gangplank between a pier and a ship. Initially, Congress sought to authorize states to extend their workers' compensation statutes seaward of the Jensen line, but the Court held the state statutes to be unconstitutional delegations of congressional power. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

Although the federal Act filled a workers' compensation void, the LHWCA, as originally enacted, provided coverage

only when "disability or death result[ed] from an injury occurring upon the navigable waters of the United States". 33 U.S.C. § 903(a) (1927). Federal compensation coverage stopped at the Jensen line; the Act did not apply to a longshoreman injured at work on a pier, even though engaged in traditional longshoremen's functions. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 218-20 (1969).

The 1972 amendments to the LHWCA moved the Jensen line landward to include areas adjoining navigable waters and "customarily used by an employer in loading, unloading, repairing, or building a vessel". 33 U.S.C. § 903(a) (1982). Yet, Congress did not extend federal coverage to every worker injured in such areas, for it added an amendment

defining a covered employee as "any person engaged in maritime employment." 33 U.S.C. § 902(3) (1982). The effect of the two amendments was to create a two-pronged coverage test -- the situs of the injury and the status of the injured worker.

In White, a railroad employee filed a claim under FELA. He had been injured on a situs covered by the LHWCA, and "the critical question presented . . . [was] whether plaintiff was a 'person engaged in maritime employment' and thus an 'employee' within the meaning of the Act." 217 Va. at 827, 232 S.E.2d at 809. White was hired as an electrician to maintain and repair the electrical equipment used at a pier to dump coal from railroad cars, to move conveyor belts transporting the coal, and to load

the coal into ships. Although White did not operate any of the equipment employed in the loading process, the railroad argued that "all of his activity was 'functionally related' to the loading of coal on ships", id. at 831, 232 S.E.2d at 812, and that he was, therefore, an employee engaged in maritime employment and, as such, was limited to the remedy provided by the LHWCA.

In White, the railroad had borrowed the "functional relationship" formula from the opinion in Sea-Land Service, Inc. v. Director, Office of Workers' Compensation, 540 F.2d 629, 637-38 (3d Cir. 1976). Considering the history of the Act and construing the congressional intent underlying the 1972 amendments, we rejected that formula. We adopted,

instead, the standard articulated in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir.), cert. denied, 429 U.S. 868 (1976)[1/]:

> [F]or an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity

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1/ The Supreme Court disapproved application of a significant relationship standard to determine the status of the worker in Director, OWCP v. Perini North River Associates, 459 U.S. 297, 302 n.8, 318-19 (1983). The Court did not, however, disapprove a significant relationship standard as a concept when applied, as in Gilmore, to post-1972 coverage landward of the Jensen line. As noted by the majority in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 424 n.10 (1985) (quoting Perini, 459 U.S. at 299, 324 n.34) the decision in Perini "was carefully limited to coverage of an employee 'injured while performing his job upon actual navigable waters' . . . [and] was, 'of course,' limited to workers covered prior to 1972".

> involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903.

Applying the Gilmore standard, we said that "we do not believe plaintiff's duties . . . had a realistically significant relationship to the loading of cargo on ships", that "plaintiff was not a covered 'employee' within the meaning of the Act", and that "the order dismissing plaintiff's FELA action will be reversed". 217 Va. at 832-33, 232 S.E.2d at 813.

In the appeals at bar, the defendant railroad relies on Price v. Norfolk & W. Ry. Co., 618 F.2d 1059 (4th Cir. 1980). There, the plaintiff in an FELA action was a painter employed by the defendant railroad. He sustained an

injury while painting the support towers of a structure housing a conveyor belt system used in loading grain into the hold of a vessel. The Price court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process", id. at 1062 n.4, the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning of the LHWCA which provides an exclusive remedy", id. at 1062.

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects. Nor do we agree with the argument advanced by the railroad in these appeals that the Supreme Court implicitly has overruled our decision in

White. On brief, the defendant says that "the U.S. Supreme Court has stated that one is engaged in maritime employment if he is 'engaged in the overall process of loading and unloading vessels' (emphasis supplied)." For this proposition, the defendant cites Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). The language the defendant quotes from that decision is an abbreviated excerpt lifted from a longer passage, the import of which we construe differently.

The injuries at issue in Caputo were sustained during the process of unloading a ship. Considering the reports of the congressional committees that initiated the 1972 amendments, the Court concluded that Congress intended

> to cover those workers involved in the essential

> elements of unloading a vessel -- taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area . . . . [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

Id. at 267 (emphasis added). As we construe this language, the Court reasoned that, although clerical employees working on a covered situs may have responsibilities related to the commercial process, unless they are "engaged in the handling of cargo", they are not "involved in the essential elements of [loading or] unloading a vessel" and,

therefore, are not statutory employees for purposes of the LHWCA. Id.

We recognize that the Act is remedial in purpose and, as the defendant says, that "Caputo requires an expansive view of LHWCA". We note, however, that the Court speaks of covered workers as those "involved in the essential elements of unloading a vessel", id.; as those "directly involved in the loading or unloading functions", id. at 271 (quoting S. Rep. 1125, 92d Cong., 2d Sess. 13 (1972) and H.R. Rep. 1441, 92d Cong., 2d Sess. 11 (1972)); and as those who "spend at least some of their time in indisputably longshoring operations", id. at 273. Two years following Caputo, the Court said that "workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act."

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 82 (1979). And the Supreme Court, recalling the language of Caputo, emphasized in its most recent analysis of the status test that the purpose of the maritime employment requirement was "to cover those workers on the situs who are involved in the essential elements of loading and unloading". Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423 (1985) (emphasis added).

We believe the "essential elements" standard is more nearly akin to the "significant relationship" standard we adopted in White than the "overall process" construction invoked by the defendant. In this respect, we see no logical difference between workers "who perform purely clerical tasks", Caputo, 432 U.S. at 267, and workers who perform

purely maintenance tasks, such as painting, or workers who, like the plaintiffs in these appeals, perform purely housekeeping and janitorial tasks.

Applying the rule in White, we hold that the plaintiffs were not statutory employees as defined in the LHWCA. We will reverse the judgments dismissing the plaintiffs' FELA actions and remand the cases for trials on the merits.[2/]

2/ In the Schwalb appeal, the defendant argues that the plaintiff "is estopped from denying LHWCA coverage" because she accepted compensation paid under the Act. According to the defendant's brief, "[s]he expresses no agreement to off-set compensation payments previously received against any recovery under FELA and, therefore, double recovery remains a possibility." But, in a memorandum of law filed in the trial court, we find that the plaintiff acknowledged that "any recovery by

Footnote continued on next page.

Record No. 841743 - Reversed and remanded.
Record No. 850728 - Reversed and remanded.

Footnote continued from previous page.

plaintiff on her FELA claim will be reduced by the amount of LHWCA benefits she may have already received.* A railroad worker who makes such a concession does not seek a double recovery and is not precluded from pursuing a remedy under FELA. Freeman v. Norfolk and Western Ry. Co., 596 F.2d 1205, 1208 (4th Cir. 1979); accord Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1049 (4th Cir. 1980).

SEVENTH JUDICIAL CIRCUIT OF VIRGINIA
Newport News, Virginia 23607

August 8, 1984

Ms. Frances S.P. Li
Suite 565
608 2nd Avenue
South Minneapolis, Minnesota 55402

Mr. William W. Nexsen
Stackhouse, Rowe & Smith
P. O. Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
P. O. Box 257
Newport News, Virginia 23607

Re: Nancy J. Schwalb v. The Chesapeake and Ohio Railway Company At Law No. 8827

Dear Counsel:

You will recall that on June 6, 1984, the Court heard argument on a special plea to jurisdiction in the above captioned cause. This special plea was filed by the defendant C&O, in which they contend that the plaintiff's sole remedy in this cause is under LHWCA

and consequently this court lacks jurisdiction on the motion for judgment.

The Court heard evidence of witnesses, stipulations by counsel, has read the memorandums of law and cases cited therein and am rendering my decision by this letter.

The plaintiff and defendant both agree that to be covered under LHWCA an injured employee must meet both a situs and a status test, both sides agree that the situs test has been met. This leaves as the only question involved whether or not the plaintiff employee is engaged in maritime employment and the Court holds that the plaintiff Schwalb is so engaged, as her duties were essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks. It is

uncontradicted that if the spilled coal was not removed that it could have haulted the process of loading the coal aboard the vessels. With the liberal interpretations expressed in decisions by the United States Supreme Court this Court has no difficulty in determining that the plaintiff's remedy is under the LHWCA. Therefore, the plea to the jurisdiction is sustained and I am requesting Mr. West to draw the appropriate order, noting plaintiff's exception and objection and having the order endorsed by opposing counsel and returning to the Court for entry.

Very truly yours,

Douglas M. Smith
Judge

THIRD JUDICIAL CIRCUIT

Circuit Court of the City of Portsmouth

May 29, 1985

Richard Wright West, Esquire
P.O. Box 257
Newport News, Virginia 23607

Russell N. Brahm, III, Esquire
P.O. Box 1138
Portsmouth, Virginia 23705-1138

Re: William McGlone v. Chesapeake and Ohio Railway Co. L84-327

Gentlemen:

Thank you for your excellent and most exhaustive memoranda. I have reviewed the pleadings, the evidence and the argument of counsel, and I have read the memoranda and all of the cases cited.

William McGlone, plaintiff, was injured at Newport News, Virginia, on February 1, 1983, and filed his

Motion for Judgment against the Chesapeake and Ohio Railway Company, defendant, on May 31, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, et. seq. Defendant filed a special plea to the jurisdiction on June 24, 1983, on the ground that plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a).

A hearing on the special plea was heard by this Court on March 29, 1985, evidence taken and a transcript prepared. It appears from the evidence that plaintiff and employee of the Chesapeake and Ohio Railway Company on the date of the accident was working on the pier as a laborer cleaning up coal

which had fallen from a conveyor belt which was being used to load coal onto a ship at the pier. The hopper and conveyor belt is an extension of the pier. If coal is not removed in the area where the plaintiff was cleaning up, the coal would eventually interfere with the loading operation and bring it to a halt. This work was frequently done by the plaintiff. Plaintiff was injured by the conveyor belt while engaged in this work. The sole action involved here is whether the plaintiff at the time of his injury was working in a maritime capacity as defined by the LHWCA.

An injured employee must meet both a "situs" and a "status" test in order to be covered under LHWCA. There seems to be no question here that the injured [sic] occurred in a covered

situs but we must determine whether plaintiff occupied a status covered under LHWCA. Noqueira v. New York, N.H., and H.R. Company. 281 U.S. 128, (1930).

The Court must resolve a conflict in the case law between a decision of the Supreme Court of Virginia, White v. Norfolk & Western Railway Co., 217 Va. 823 (1977), cert. denied, 434 U.S. 860 (1977) and Price v. Norfolk & Western Railway Company, 618 F2d 105 (1080) [sic], decided by the Fourth Circuit Court of Appeals. In White the court stated at page 832:

> "Plaintiff was not actually handling any cargo either manually or mechanically, as was the case in the decisions principally relied on by N & W. Moreover, plaintiff was not manipulating (except to test) any of the controlls of the electrical mechanism, which furnished the power for

> this automated loading process. Rather, he was only maintaining the electrical device on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact that some of the plaintiff's cumulative injury was sustained out over the Elizabeth River while he worked inside the electrial rooms of the Pier 6 ship loaders, does not convert his status from that of a railroad electrician to that of a maritime worker."

It can thus be seen that the Virginia Supreme Court held that to qualify as an employee under LHWCA the plaintiff must have been directly involved in the loading of coal. Under this ruling plaintiff could not have been held to be an employee under LHWCA.

Price decided three years after White holds to the contrary.

The Fourth Circuit held that a railway employee who was injured while painting towers used in the loading of ships was an employee under LHWCA. The court held that merely because the employee was not directly involved in the actual loading of ships, this fact did not remove him from coverage under LHWCA because the maintenance of the towers was essential to the movement of maritime cargo and thus the employee was included in the broad concept of maritime employment.

This view has been upheld in many Federal court decisions. See: Newport News Shipbuilding and Drydock Company v. Graham, 573 F2d 167 (4th Circuit), cert. denied, 439 U.S. 979, 99

S.Ct. 563 (1978); Northeast Marine Terminal Company v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977).

It will thus be seen that the Fourth Circuit has adopted a broad concept of maritime employment that maintenance of maritime cargo loading equipment is essential to the loading of cargo and is, therefore, included in the meaning of a person engaged in maritime employment under LHWCA.

White stands alone in contrast to the federal decisions which were decided after the decision in White.

Should this court blindly follow White because it is a State court decision, under the principle of stare decises? To do so would be to interpret a Federal law contrary to all of the decisions of the Federal courts which

have declined to follow White and have disagreed with its results. It is the Court's belief that this conflict between the Supreme Court of Virginia and the Fourth Circuit Court of Appeals must be resolved in favor of the latter decisions of the federal courts and this Court reluctantly and respectfully declines to follow White since it feels the decision in Price is now controlling.

The Court is of the opinion that the plaintiff in this case, under the facts presented, was engaged in activity which made him an employee under the meaning of LHWCA, and that he is precluded from maintaining a FELA action in this case.

Defendant's special plea to the jurisdiction of this Court is

sustained, and the plaintiff's Motion for Judgment will be dismissed from the docket.

Counsel for the defendant will prepare and circulate a sketch order in accordance with this letter and for presentment to the Court for entry.

Sincerely yours,

Lester E. Schlitz
Chief Judge

SEVENTH JUDICIAL CIRCUIT
Newport News, Virginia
May 21, 1984

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Re: Daniel C. Turnista v.
The Chesapeake and Ohio
Railroad Company, a
corporation, Law No. 8690-WS

Gentlemen:

The court has reviewed the pleadings and argument, the evidence and the excellent memoranda.

Daniel C. Turnista (plaintiff) was injured at Newport News, Virginia on April 19, 1982 and filed his Motion for Judgment against The Chesapeake and Ohio Railroad Company (defendant) on August 25, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, et seq.. Defendant filed its Special Plea to Jurisdiction (special plea) on September 15, 1983, asserting that plaintiff's sole and exclusive remedy against it is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a). If defendant's contention is valid, then relief under LHWCA is plaintiff's exclusive remedy and the FELA action must be dismissed.

On March 28, 1984 at the time of the hearing on the special plea, the parties stipulated that:

(1) defendant is an "employer" as defined by 33 U.S.C. 902(4) of LHWCA at the time of plaintiff's accident;

(2) that plaintiff was then and there employed by defendant; and

(3) that the injuries of which plaintiff complains occurred "upon the navigable waters of the United States" as defined by U.S.C. §903(a) of LHWCA.

The sole issue is whether the plaintiff at the time of his injuries was a person engaged in maritime employment as defined by 33 U.S.C. §902(3) of LHWCA.

The facts are not in contention. The evidence disclosed that plaintiff, a machinist, was injured in a fall onto a barge while burning shackles loose with

an acetylene torch as a part of the work required to replace the hood of the off-shore coal loading tower on the south side of Pier 14. As a machinist in the mechanical department of defendant, plaintiff spent 50% or more of his working time between the coal loading dumper and the end of the piers, and, otherwise worked in a shop located between the dumper and Pier 14, primarily performing repair and maintenance on coal loading equipment.

The evidence further disclosed that in proceedings pending before U.S. Department of Labor, Office of Workers' Compensation Programs, defendant had paid plaintiff under LHWCA (as of time of hearing), compensation payments aggregating in excess of $29,500.00, and, that plaintiff (though disputing

defendant's computation of weekly wage and length of disability) had not challenged coverage under said Act for injuries received on April 19, 1982.

Resolution of this issue comes down to whether the court is required to follow a decision of the Virginia Supreme Court rendered in 1977 or one of the United States Court of Appeals, Fourth Circuit rendered in 1980.

In a unanimous opinion of the United States Supreme Court in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268, 97 L. Ed. 2d 320, 335 (argued April 18, 1977; decided June 17, 1977), Justice Marshall stated:

> ****The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally

> construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' Voris v. Eikel, 346 US 328, 333, 98 L Ed 5, 74 S. Ct. 88 (1953).***"

The Virginia Supreme Court decision in White v. Norfolk and Western Railway Company, 217 Va. 823, 232 S.E. 2d 801 (1977), cert. denied 434 U.S. 860 (1977) was rendered on March 4, 1977 and held that White was not a covered "employee" within the meaning of the Act, saying at page 832:

> "Applying the section 2(3) language defining 'employee' in the light of what we perceive to have been Congress' purpose when the 1972 Amendments were adopted, we do not believe plaintiff's duties, in the electrical rooms where the injury allegedly occurred, had a realistically significant relationship to the (833) loading of cargo on ships. Stated differently, when plaintiff was injured he was not directly involved in the loading of coal. See Jacksonville Shipyards, Inc.

v. Perdue, supra, 539 F.2d at 539.

"Plaintiff was not actually handling any cargo, either manually or mechanically, as was the case in the decisions principally relied on by N&W. Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only maintaining the electrical devices on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact some of plaintiff's cumulative injury was sustained out over the Elizabeth River, while he worked inside the electrical rooms of the Pier 6 shiploaders, does not convert his status from that of a railroad electrician to that of a maritime worker.

Thus, the Virginia Supreme Court (in opinion rendered by five justices), in

effect, narrowly held that to be an "employee", the plaintiff must have been directly involved in the loading of the coal (emphasis supplied).

In Price v. Norfolk and Western Railway Company, 618 F.2d 105 (1980), the Fourth Circuit held that a railroad employee injured while painting support towers for the gallery used for conveying grain (loading and unloading ships and barges and not for storage) as a part of routine maintenance for which Norfolk and Western was responsible was "an employee" within the meaning of LHWCA (33 U.S.C. §902(3). In concluding (page 1062) that "***The Gallery involved here is just as essential to the actual loading and unloading of ships as the machine involved in Graham was to their building***", the opinion

reviewed applicable decisions since Northeast Marine Terminal, at page 1061:

> "We feel that our decision in Newport News Shipbuilding & Drydock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978), is controlling in this case and requires that we reverse the district court's holding that Price was not an employee within the meaning of the Act and therefore was entitled to recover under the FELA. In Graham, a claimant Jones was seeking compensation under the LHWCA for injuries sustained when he bumped against a machine which he was oiling. The machine was used in building ships. He was rated as a mechanic and belonged to the maintenance department of the employer. In holding that Jones was entitled to compensation under the LHWCA, we stated: 'Because Jone's maintenance was essential to keeping the shipyard's machinery in working order for the construction of ships, we conclude that he was a shipbuilder within the meaning of the Act.' Id. at 170.

"In so holding, we cited with approval a Benefits Review Board decision that is directly on point. In Bradshaw v. McCarthy, 3 BRBS 195 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977), a mechanic injured his back in a terminal while removing a tire from a forklift he was repairing. The forklift was used to unload ships and to load freight cars, tractors, and trailers. In holding that the claimant was an employee as defined in the Act, the Board stated:

> Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment.

Id. at 198. We can discern no significant distinction between

the repair of machinery essential to the movement of maritime cargo and the painting of a structure essential to the loading and unloading of the same. Nor can we discern any significant distinction between oiling a machine used in building ships, as was the claimant in Graham, and painting a structure used in loading and unloading ships. There is no doubt that employees employed in 'taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area' are "employe(es)" within the meaning of the amended statute. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 267, 97 S.Ct. 2348, 2359, 53 L.Ed.2d 320 (1977). The holding in Graham that a maintainer of a shipbuilder's machinery is covered requires a holding here that a maintainer of a longshoreman's machinery be covered.

"We find no merit in the argument of plaintiff that the fact that the plaintiff was (1062) merely painting the structure housing the conveyor mechanism that transports the grain, rather than the mechanism itself, is sufficient to distinguish this case from

> Graham and Bradshaw. The Gallery involved here is just as essential to the actual loading and unloading of ships as the machine involved in Graham was to their building. We should add at this point that we also find persuasive the direction of Northeast Marine Terminal that we take an 'expansive view' of this 'remedial legislation'. 432 U.S. at 268, 97 S.Ct. at 2359.

It is apparent that the Fourth Circuit has adopted the expansive view that "maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment." Since Northeast Marine Terminal, the federal courts have consistently applied the "expansive view" in interpreting the meaning of a "person engaged in maritime employment" as that term is used in 33 U.S.C.

§ 902(3) of LHWCA, and, it appears no court has followed White.

Is White nevertheless binding upon this court under the principal of stare decises? Neither Graham (decided March 13, 1978) nor Price (decided April 9, 1980) followed White, the latter expressly declining so to do saying ((sic) at page 1062, "***and with respect simply disagree with White." There is no suggestion in any of the memoranda that the precise question is now before the United States Supreme Court.

With Northeast Marine Terminal and its progeny Graham and Price binding on the Federal district courts, for this court to follow White would further frustrate lack of uniformity between federal snd state court decisions

governing the interpretation of the meaning of a federal statute (particularly affecting the Hampton Roads area where ship construction and repair, shipping and longshoring activities are common place), a result the court concludes is not intended by White in view of the subsequent decisions in Graham and Price. The court respectfully declines to follow White, concluding that Price is controlling.

The court is of the opinion that at the time of his injury, plaintiff was engaged in maritime employment, and, thus was an "employee" within the meaning of 33 U.S.C. § 902(3) of LHWCA and that his exclusive remedy against defendant is under LHWCA.

Accordingly, the court concludes that plaintiff is precluded from

maintaining subject FELA action and that defendant's special plea is sustained and the action of plaintiff is dismissed from the docket with prejudice to plaintiff.

Having so concluded, it is not necessary to reach the issue of what, if any, effect plaintiff's acceptance of compensation payments from defendant under LHWCA has on his right to maintain the FELA action.

Counsel for defendant is required to prepare an appropriate sketch for order sustaining the special plea for the reasons set forth in the foregoing letter opinion and dismissing the action from the docket with prejudice to plaintiff, circulate same to counsel for plaintiff for endorsement, and, to the court for consideration and entry.

Very truly yours,

/s/ J. Warren Stephens
Judge

THE UNCERTAINTY CREATED BY THE DECISION BELOW RESULTS IN SIGNIFICANT PRACTICAL PROBLEMS

The decision of the Virginia Supreme Court, since it is in conflict with the federal circuits, including the very Circuit in which it is located--the Fourth Circuit, produces an uncertainty as to whether the claim of a railroad worker injured in connection with shiploading activities ultimately will be held subject to LHWCA or FELA coverage. This uncertainty, in turn, creates a number of practical problems for all concerned with the claim.

At the very outset, both the employee and the employer must make a decision as to whether to file the statutory notices required by the LHWCA (33 U.S.C. §§ 912 and 930), whereas no such notices are required under the FELA.

Then the question arises as to the scope of the investigation into the circumstances of the accident, since the LHWCA requires only that the employee be injured during the course and scope of his employment, whereas under FELA the investigation is necessarily more extensive since it involves questions of the railroad's negligence and the employee's contributory negligence because of the comparative negligence concept incorporated into the FELA (45 U.S.C. §§ 51 and 53). Even the ability of the parties to obtain doctors, for purposes of either examination or treatment, is affected because many physicians will not make their services available if there is a likelihood they will have to testify in court (under the FELA, in a jury trial). They tend to be more cooperative in

LHWCA claims, where their written reports are sufficient, introduced under the relaxed rules of evidence prescribed by 33 U.S.C § 923, or they may testify by deposition without having to physically be present at the hearing. See, Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117 (5th Cir. 1980).

The railroad is then faced with the problem of whether to secure compensation benefits for the injured employee as required under the LHWCA, which imposes penalties for failure to do so (33 U.S.C. § 914). By contrast, under the FELA, interim disability or unemployment benefits are obtained by the employee from the Railroad Retirement Board (45 U.S.C. § 351, et seq.) and not from the railroad. If the employee recovers under the FELA, there

is a statutory lien on his recovery for the amounts paid by the Board. 45 U.S.C.§ 362(o).

There are many other practical difficulties which emanate from the uncertainty created by the decision below. Without listing them in detail,[3/] these difficulties pale by comparison with the major difficulty -- the practical inability to conclude a settlement of the claim due to the totally different schemes of compensation contemplated by LHWCA and the FELA. Under LHWCA, compensation is awarded

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3/ These include items which appear to have limited legal significance, but which have great consequence for the injured employee. For example, under LHWCA, the employee must continue treatment by his original physician unless the employer consents to a change (20 C.F.R. § 702.406), whereas under FELA he may go to any physician of his choice.

generally on the basis of a percentage of average weekly wages, either under a schedule for enumerated injuries or to compensate the employee for diminished wage-earning capacity (33 U.S.C. § 908). On the other hand, under FELA damages are awarded to the employee by a jury on the same basis generally allowed in other civil cases.[4/] Because the benefits available under the respective statutes are different, resolution of claims by settlement would be virtually impossible until the final adjudication

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4/ Under FELA, there is only one recovery for past, present and future injuries and losses, including medical expenses. Under LHWCA, the employer is liable in cases of temporary or permanent injury to pay the prescribed amounts throughout the period of disability and is under a continuing duty to provide medical attention therefor. 33 U.S.C. § 907.

of the question as to which of the statutes applies,[5/] necessitating that the case be filed in the courts for a final resolution.

Thus the uncertainty created by the decision below not only generates many difficulties for the employee, the railroad, and their respective attorneys, but also serves to burden the courts with yet additional litigation.

5/ Even assuming arguendo that the parties were able to agree upon a settlement, that would not necessarily put the problem to rest because of the "Catch-22" situation created by the two statutes. The LHWCA renders invalid any agreement waiving compensation under the Act (33 U.S.C. § 915[b]), and an employer's liability is not discharged unless the settlement is approved by the Commission (33 U.S.C. § 908[i][1]). The FELA similarly precludes any contract or device by which the carrier exempts itself from liability under that Act. (45 U.S.C. § 55).

33 U.S.C.A. § 902 (West 1986).
Definitions

When used in this chapter--

* * * * *

(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include --

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3) (as amended in 1972 by Pub. L. 92-576 but prior to the 1984 Amendments, Pub. L. 98-426)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C.A. § 905 (West 1986). Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an

action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

* * * * *

45 U.S.C.A. § 51 (West 1986). Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

* * * * *

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.